UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
	Hon. Anita B. Brody
Kevin Turner and Shawn Wooden, *on behalf of themselves and others similarly situated,* Plaintiffs,	Civ. Action No. 14-00029-AB
v.	
National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	
THIS DOCUMENT RELATES TO: ALL ACTIONS	

SPECIAL MASTER RULING: APPLICATION OF THE DEFINITION OF ELIGIBLE SEASON TO GAME DAY ROSTER DESIGNATIONS

I. INTRODUCTION

This matter requires the Special Master to interpret a provision of the Amended Class Action Settlement Agreement (hereinafter, "the Settlement Agreement") that dictates offsets of Monetary Awards to Claimants based on the number of "Eligible Seasons" the Retired Player played in the National Football League (hereinafter, the "NFL").

The parties dispute the Settlement Agreement's definition of an "Eligible Season" and disagree about whether Players who were moved from their Club's "Active List" to its Inactive List on game-day accrue games toward an Eligible Season. For the reasons stated below, the Special Master holds that such games do accrue toward an Eligible Season. This ruling is a "Matter of Law" as defined by the Settlement Agreement.

II. BACKGROUND

A Retired NFL Player who receives a Qualifying Diagnosis according to the terms of the Settlement Agreement is eligible to receive a Monetary Award in the amount set by the Monetary Award Grid in Exhibit 3 of the Settlement Agreement.[1] Under § 6.7(b)(i) of the Settlement Agreement, Monetary Awards are subject to downward adjustments for Retired Players who accrued fewer than five "Eligible Seasons" in the NFL. The fewer Eligible Seasons a Player accrued, the steeper the reduction of the Monetary Award: The Award for a Player with 4.5 Eligible Seasons is offset by ten percent, the Award for a Player with 4 Eligible Seasons is offset by twenty percent, and so forth.

Section 2.1(kk) of the Settlement Agreement defines "Eligible Seasons," granting a Player a full Eligible Season if he was:

(i) On a Club's Active List "on the date of three (3) or more regular season or postseason games," or

(ii) On a Club's Active List "on the date of one (1) or more regular or postseason games, and then spent at least two (2) regular or postseason games on [the Club's] injured reserve list or Inactive List due to a concussion or head injury."[2]

The parties dispute what it means to be on the "Active List." Per the Constitution and By-Laws of the National Football League, Clubs have to cut down their roster to a 53-Player "Active List" prior to the first regular-season game; however, ninety minutes before kickoff of each game, they are required to establish a 45-Player "Active List" and place the remaining rostered Players on the "Inactive List."[3] It is undisputed that the Players who are placed on the Inactive List on game day often practice in full for the week leading up to the game.

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[1] Receipt of a Monetary Award is subject to other requirements set forth in the Settlement Agreement that are not pertinent to this opinion.

[2] Section 2.1(kk) also allows Players to accrue "half of an Eligible Season" by spending at least eight games on a Club's "practice, development, or taxi squad" roster; or being on the active roster of a team in the World League of American Football, NFL Europe League, or NFL Europa League "on the date of three (3) or more regular season or postseason games" or "one (1) or more regular or postseason games" followed by "at least two (2) regular or postseason games on [the team's] injured reserve list or team inactive list due to a concussion or head injury."

[3] §§ 17.1(f) and 17.3 of the Constitution & By-Laws of the National Football League, Appended as Ex. A in Part II(B) of the Resp.'s to Special Masters (filed Oct. 18, 2017). The NFL states in its brief that both the season-long and game-day rosters have changed in size over time, explaining that prior to 1993, the maximum season-long roster was 47 Players, with 45 Players active on game day. (Resp.'s to Special Masters (filed Oct. 18, 2017), at 38 n. 1.) In 2011, the game-day rosters expanded from 45 to 46, while season-long rosters remained at 53. The NFL contends that because of the non-static nature of these rosters, the parties refrained from defining "Active List" in the Settlement Agreement by reference to a specific number of Players. (*Id.*)

The question before the Special Master is whether a Player who is assigned to the Inactive List ninety minutes before kickoff qualifies as someone who was on the Active List "on the date of" the game for purpose of accruing Eligible Seasons.

III. ARGUMENTS OF THE PARTIES

A. Argument by the NFL Parties

The NFL argues that interpreting the Settlement Agreement to count games on the Inactive List towards the accrual of an Eligible Season would violate basic principles of contract interpretation by rendering a provision of the Agreement meaningless. (Resp.'s to Special Masters (filed Oct. 18, 2017), at 41 (hereinafter, "Responses") (citing In re G-I Holdings, Inc., 755 F.3d 195, 202 (3d Cir. 2014) ("Court[s] should interpret the contract in such a way as to not render any of its provisions illusory or meaningless.")).

The NFL asserts that crediting *all* games spent on the Inactive List would render part (ii) of the Eligible Season definition – which specifically credits games on the Inactive List *due to a concussion or head injury* – superfluous. (Responses, at 40-41.)

Finally, the NFL claims that, because there is only one possible way to interpret § 2.1(kk) – to discount games on the Inactive List unless those games qualify for part (ii) of the Eligible Season definition – the provision is clear and unambiguous. (*Id.*, at 41.) Accordingly, the NFL argues, the plain meaning of the provision must be applied: Contract interpretation doctrine forbids a court from considering extrinsic evidence (such as the evidence of intent set forth by Co-Lead Class Counsel) in interpreting a clear and unambiguous provision. (*Id.* (quoting Great Am. Ins. Co. v. Norwin Sch. Dist., 544 F.3d 229, 243 (3d. Cir. 2008) ("Only where a contract's language is ambiguous may extrinsic or parol evidence be considered to determine the intent of the parties…In the absence of an ambiguity, the plain meaning of the agreement will be enforced.") (internal citations omitted)).

B. Argument by the Co-Lead Class Counsel

Co-Lead Class Counsel argue that the "letter and spirit" of the Settlement Agreement is violated by excluding rostered Players who practiced the week leading up to the game but were placed on the Inactive List 90 minutes before kickoff from Eligible Season accrual. (Responses, at 17.) Counsel notes that Eligible Seasons were chosen as a proxy for the number of concussive hits sustained by Retired Players as a result of playing in the NFL. (*Id.*, at 12 (citing In re Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351, 409 (E.D. Pa. 2015), *amended* No. 2:12-MD- 02323-AB, 2015 WL 12827803 (E.D. Pa. May 8, 2015), *aff'd* 821 F.3d 410 (3d Cir. 2016), *as amended* (May 2, 2016)).

Thus, Counsel argues that the NFL's interpretation of the definition of "Eligible Seasons" would lead to an "absurd result." (*Id.*, at 17.). Rostered Players who practiced for the entire week leading up to the game – sustaining hits in the process – before being placed on the Inactive List 90 minutes prior to game time would not accrue any games toward an Eligible Season, but non-

roster practice and developmental squad members *would* accrue games toward half an Eligible Season.

IV. DISCUSSION

A. Choice-of-Law Analysis

In multi-district litigation (MDL) consolidation under 28 U.S.C. § 1407, where the court has jurisdiction under 28 U.S.C. § 1332 based upon diversity of citizenship, the transferee court applies state substantive law as determined by the choice of law analysis required by the state in which the action was filed. Oil Field Cases, 673 F. Supp. 2d 358, 363 (E.D. Pa. 2009). Although this case was filed in multiple states, the prevailing choice-of-law analysis under any state would be substantially the same. Because federal district courts with diversity jurisdiction under 28 U.S.C. § 1332 must apply the choice-of-law rules of the state in which they sit, for the purposes of this decision, the Special Master will apply Pennsylvania choice-of-law analysis to determine the applicable state substantive law. Carlson v. Arnot-Ogden Mem'l Hosp., 918 F.2d 411, 413 (3d Cir. 1990) (citing Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487, 496 (1941)).

Pennsylvania courts tend to honor the intent of the parties by enforcing a contractual choice-of-law provision. T & N, PLC v. Pa. Ins. Guar. Ass'n, 44 F.3d 174, 185-86 (3d Cir. 1994) (citing Smith v. Commonwealth Nat. Bank, 557 A.2d 775, 777 (Pa. Super. 1989), *appeal denied*, 569 A.2d 1369 (Pa. 1990) ("The Pennsylvania courts have adopted section 187 of the Restatement (Second) Conflict of Laws which provides that…the law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.").

Per § 27.1 of the Settlement Agreement, the parties have agreed that the provisions of the Settlement Agreement shall be "interpreted and enforced in accordance with the laws of the State of New York." Accordingly, the Special Master will honor the intent of the parties and interpret the Settlement Agreement according to the state contract law of New York.

B. Whether There is Only One Interpretation That Gives Meaning to All Provisions

Because the NFL argues that interpretive principles of contract law allow for only one possible interpretation of § 2.1(kk) of the Settlement Agreement, the Special Master will analyze this argument first to see if it obviates the need for further review.

The Settlement Agreement is governed by contract-law principles. See Interspiro USA, Inc. v. Figgie Int'l, Inc., 815 F. Supp. 1488, 1501 (D. Del. 1993) (citing Rainbow v. Swisher, N.E.2d 258, 259 (N.Y. 1988) ("Under New York law, [a] settlement agreement must be interpreted as any other contract.") (internal quotations omitted).

Under the law of New York, the parties are bound to the "plain terms" of a contract "unless, when so construed, the contract becomes meaningless." See Peerless Weighing & Vending Mach. Corp. v. Int'l Ticket Scale Corp., 126 F.2d 239, 241 (3d Cir. 1942) (citing Stern

v. Premier Shirt Corporation, 183 N.E. 363, 364 (N.Y. 1932); Outlet Embroidery Co., Inc. v. Derwent Mills, Limited, 172 N.E. 462, 463 (N.Y. 1930); Cohen & Sons, Inc. v. M. Lurie Woolen Co., Inc., 133 N.E. 370, 371 (N.Y. 1921).

The NFL argues that crediting *all* games in which a Player was placed on the Inactive List on the date of the game would render the second provision of § 2.1(kk) (hereinafter, "part (ii)") – which specifically credits games for which a Player was on the Inactive List "due to concussion or head injury" – meaningless. (Responses, at 40-41.) The Special Master concurs that unless there is a possible interpretation of § 2.1(kk) that credits all games in which a Player was placed on the Inactive List "on the date of" the game *without* rendering superfluous the provision crediting a specified subset of games spent on the Inactive List, then the NFL's interpretation of this provision must control.

The Special Master finds that there is another interpretation of § 2.1(kk) under which part (ii) would retain meaning. Such an interpretation hinges on the presence of the phrase "on the date of" in both parts (i) and (ii) of the Eligible Season definition. Per the Constitution and By-Laws of the National Football League, teams are not required to assign Players to the Inactive List until ninety minutes before kickoff. (Responses, at 23.) These provisions can be reasonably interpreted to conclude that Players who are first placed on the Inactive List 90 minutes before kickoff *were* on the Club's Active List "on the date of" the game, thereby fulfilling the requirements of § 2.1(kk) for accrual towards an Eligible Season.

If the lynchpin of accrual of a game towards an Eligible Season is presence on the Active List "on the date of" the game, then part (ii) would serve a purpose: crediting Players who were placed on the Inactive (or Injured Reserve) Lists *prior to* "the date of the game" for reasons related to a concussion or head injury," while *not* crediting Players who were placed on those lists prior to the date of the game for other reasons not related to a head injury.

Accordingly, the Special Master finds that the plain language of the Settlement Agreement allows for an interpretation that does not render any of its provisions superfluous.

C. Whether the Plain Meaning of the Terms of § 2.1(kk) are Ambiguous

Because there are multiple potential interpretations of § 2.1(kk) that give effect to all provisions of the Settlement Agreement, the Special Master must now turn to the issue of interpreting the relevant provisions. Under New York law, a court must interpret a contract according to the intent of the parties; if such intent is "discernible from the plain meaning of the provisions of the agreement, then there is no need to look further." Peak Partners, LP v. Republic Bank, 191 F. App'x 118, 123 n.5 (3d Cir. 2006) (quoting Evans v. Famous Music Corp., 807 N.E.2d 869, 872 (N.Y. 2004).

A contract that is "complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Mosaid Techs. Inc. v. LSI Corp., 629 F. App'x 206, 211 (3d Cir. 2015) (quoting Greenfield v. Philles Records, Inc., 780 N.E.2d 166, 170 (N.Y. 2002)). Thus, when the plain meaning of the contract is clear and unambiguous, New York courts do not consider extrinsic evidence to determine the intent of the parties. Bethlehem Steel Co. v. Turner Constr. Co., 141 N.E.2d 590, 593 (N.Y. 1957) ("It has long been the rule that when

a contract is clear in and of itself, circumstances extrinsic to the document may not be considered.").

In considering whether a provision is ambiguous, courts review the entire contract. Franklin Advisers, Inc. v. iHeart Commc'ns Inc., No. 04-16-00532-CV, 2017 WL 4518297, at *2 (Tex. App. Oct. 11, 2017) (applying New York state contract law). A contract is ambiguous when "reasonable minds could differ" as to what the parties intended. Van Wagner Adver. Corp. v. S & M Enters., 492 N.E.2d 756, 759 (1986). The provisions of a contract are not considered ambiguous solely because the parties seek different interpretations. Seiden Assocs. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992) (applying New York law). It is therefore incumbent upon the Special Master to determine whether the relevant terms of the Settlement Agreement have a plain meaning, and whether reasonable minds could differ as to the plain meaning of the agreement.

New York courts often refer to the dictionary definition of the terms of a provision in order to determine the plain meaning of a contract. See Graev v. Graev, 2008 NY Slip Op 7945, ¶ 1, 898 N.E.2d 909, 910 ("Words in a contract are to be given their ordinary dictionary meanings."); see, e.g., In re Nortel Networks, Inc., 737 F.3d 265, 271 (3d Cir. 2013) (applying New York contract law and holding that the Oxford English Dictionary definitions of "dispute" and "resolver" constituted the plain meaning of the words).

Here, the provision in question, § 2.1(kk) of the Settlement Agreement, reads as follows:

> "'Eligible Season' means a season in which a Retired NFL Football Player or deceased Retired NFL Football Player was: (i) on a Member Club's Active List *on the date of* three (3) or more regular season or postseason games…" (emphasis added).

There is one critical clause in the provision for the purposes of this dispute: "on the date of." Black's Law Dictionary's primary definition of "date" is "[t]he day when an event happened or will happen," such as the "date of trial." *Date*, Black's Law Dictionary (10th ed. 2014). It follows from this definition that the status of a particular person "on the date of" a specified event refers to that person's status on the day when that event "*will happen.*" Section 2.1(a) of the Settlement Agreement specifies that the "Active List" means the "list of all Players physically present, eligible and under contract to play for a [Club] *on a particular game day*" (emphasis added), and § 2.1 clarifies that all "references to 'day' or 'days' in the lower case are to calendar days." Thus, when a Player is present, eligible and under contract to play on the calendar day of a particular game, the Settlement Agreement instructs that the Player is on the Active List for that game.

The common law has long refrained from fractionalizing a day unless otherwise specified by the parties: "A thing done at any time during the day is in legal effect done on the last instant of the day." In re Puglisi, 230 F. 188, 189 (E.D. Pa. 1916); see also Garelick v. Rosen, 8 N.E.2d 279, 281 (N.Y. 1937) ("[I]n the absence of an express limitation, the law does not take notice of a fraction of a day."); 2 WILLIAM BLACKSTONE, COMMENTARIES *141 ("In the space of a day all the twenty-four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes.").

If the parties had intended to specify that a Player must be on the Active List at the particular moment that the game starts, rather than on the calendar day of the game, they could have written the provision accordingly. See, e.g., Swenson v. Erickson, 2006 UT App. 34, P.3d 267, 271 ("The inclusion of only a date without a specific time suggests that [the action] could be taken any time that day. If the parties had intended to impose a strict 12:01 a.m. deadline…the [agreements] could have said so."); see also Carter Petroleum Prods. v. Bhd. Bank & Tr. Co., 33 Kan. App. 2d 62, 67 (2004) ("Accordingly, if the [appellant] wanted more specificity as to when and where [appellee] had to make presentment, [they] could have included such provisions [including a]…specific time of day.").

Accordingly, the Special Master finds that when a Player is not placed on the Inactive or Injured Reserve Lists until the calendar day of the game, that Player is on the Active List "on the date of" that game and accrues a game towards an Eligible Season.

Because such an interpretation of the Settlement Agreement can be effected without rendering part (ii) of § 2.1(kk) meaningless – by discounting the accretion of games for which the Player was placed on the Injured Reserve or Inactive List prior to the calendar day of the game, *unless* that Player was placed on such a list due to a head injury as specified in part (ii) – the plain meaning of the provision compels an interpretation that credits games in which the Player was on the Active List on the calendar day of the game.

D. Whether the Plain Meaning Leads to an Absurd Result

Because the plain meaning of § 2.1(kk) credits Players on the Active List on the day of the game towards an Eligible Season, the Special Master must determine whether the exception to the plain-meaning rule is triggered. Under New York law, a "contract should not be interpreted to produce a result that is absurd," "commercially unreasonable," or "[gives] one party an unfair and unreasonable advantage over the other." Dervan v. Gordian Grp. LLC, No. 16-CV-1694 (AJN), 2017 WL 819494, at *6 n.3 (S.D.N.Y. Feb. 28, 2017) (quoting Luver Plumbing & Heating, Inc. v. Mo's Plumbing & Heating, 43 N.Y.S.3d 267, 269 (N.Y. App. Div. 2016)). Courts may thus modify the plain meaning of an unambiguous contract if enforcing the contract under its plain meaning would lead to such an unfair, unreasonable, or absurd result. Wallace v. 600 Partners Co., 658 N.E.2d 715, 717 (1995).

Applying the plain meaning of § 2.1(kk) would result in some line-drawing that could conceivably be perceived as unfair. For example, a rostered Player who spent three weeks practicing with the team – only to be placed on the Inactive List on the date of each game – and then injured his leg on the first day of Week 4 would accrue a full Eligible Season. By contrast, a Player who spent eight games on the same team's practice, developmental, or taxi squad would have played in the same number of games (zero) and practiced for five more weeks, only to accrue half of an Eligible Season. However, as the NFL notes, "There was—and always will be—line-drawing that occurs in this type of Settlement." (Responses, at 43.) This Court has already held that "[w]hile the Settlement may have been more generous if [those] Retired Players received Eligible Season credit, the lack of credit does not render the Settlement unfair." *Id.* (citing In re Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351 at 410). Indeed, as Co-Lead Class Counsel detail, a reading that the eight Players only placed on the Inactive List 90 minutes prior to game time, but who participated fully in practice all week,

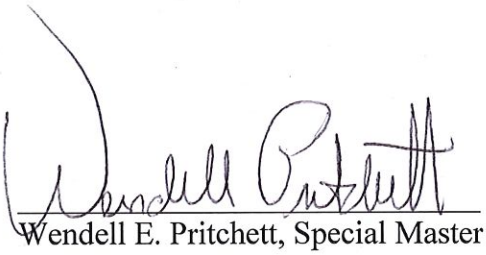
would receive less credit than those on the practice squad who were not on the active list at any time on a game day would lead to an absurd result (Responses, at 17.)

Additionally, the Special Master finds nothing in this interpretation of § 2.1(kk) that leads to an unfair or commercially-unreasonable result: While the total cost of payouts under the Monetary Award Fund may increase incrementally, this does not suffice to meet the standard of commercial unreasonableness. Veliz v. Cintas Corp., No. C 03-1180 SBA, 2004 WL 2452851 *modified on reconsideration*, No. 03-01180(SBA), 2005 WL 1048699 (N.D. Cal. May 4, 2005), at *28 (N.D. Cal. Apr. 5, 2004) ("The presence of a commercially unreasonable term [refers to] a term that no one in his right mind would have agreed to.").

V. CONCLUSION

The Special Master holds that the plain meaning of the terms of the Agreement is evident: retired NFL Players who were on the Active List on the calendar day of their Club's particular regular season or postseason game shall receive credit toward that game for the purposes of calculating an Eligible Season, even when the Player was placed on the Inactive or Injured Reserve Lists prior to the start of the game.

Date: December 4, 2017



Wendell E. Pritchett, Special Master

FINDINGS AND REMEDIES OF THE SPECIAL MASTERS PURSUANT TO SECTION 10.3(i) REGARDING SEVEN MONETARY AWARD CLAIMS

I. INTRODUCTION.

Pursuant to Section 10.3 of the Settlement Agreement and Rule 7(b) of the Rules Governing Audit of Claims (the "Audit Rules"), the Claims Administrator audited seven Monetary Award Claims that relied on neuropsychological testing Dr. August Dolan-Henderson performed. This Audit included reviews of records, interviews with relevant individuals, and consultation with an Appeals Advisory Panel Consultant. The Claims Administrator concluded that Dr. Dolan-Henderson misrepresented information submitted to the Program in connection with the seven Monetary Award Claims.

On March 14, 2018, the Claims Administrator referred these seven Monetary Award Claims to the Special Masters for review and findings in accordance with Section 10.3(i) of the Settlement Agreement. The Claims Administrator also notified Settlement Class Members of the referral. Three Settlement Class Members withdrew their claims following the Claims Administrator's referral to the Special Masters under Section 10.3 of the Settlement Agreement. The Special Masters reviewed the Record of the Audit Proceeding and issues these findings and remedies for the remaining claims.

II. FACTUAL BACKGROUND.

The Claims Administrator began auditing Dr. Dolan-Henderson after finding that two versions of a neuropsychological report that he prepared for a player for the same evaluation contained conflicting information. These two reports listed the same assessment date, report date, signature date, and player background and history, but the testing battery described was different. For two tests listed in both test batteries, the player's scores differed in the two reports. In addition, in one report, Dr. Dolan-Henderson referred to the player by the wrong name.

The Claims Administrator contacted the player's lawyer and Dr. Dolan-Henderson to ask why two versions of the same report were included with the claim and received two different explanations. The player's lawyer submitted a written statement from Dr. Dolan-Henderson saying the reports differed because the second version was reformatted to conform with the Settlement Agreement. The Claims Administrator later interviewed Dr. Dolan-Henderson over the phone. He stated that the two reports were not for the same person. He said he realized his mistake of using another person's test scores in the original report, which prompted him to issue the revised report and that he notified the player's lawyer of the error and instructed that only the second report should be used.

After receiving conflicting explanations for the two versions of the same report, the Claims Administrator requested input from two Appeals Advisory Panel Consultants regarding whether either explanation adequately addressed the concerns identified in the Audit. They found neither explanation to be credible and instead indicated that they would not accept either report or any report prepared by Dr. Dolan-Henderson as valid because of the concern that test results in a report may not belong to the player named in the report and be otherwise unreliable.

The Claims Administrator then reviewed all seven claims supported by neuropsychological testing from Dr. Dolan-Henderson. During this analysis, the Claims Administrator identified a second player whose file contained two versions of the same report from Dr. Dolan-Henderson with conflicting information. These differing reports display some of the same issues previously identified: both have the same report date but provide different test batteries. For one test listed in both test batteries, the player's scores in the two reports are different.

The Claims Administrator identified that the claim file of a third player contained two different neuropsychological reports: the first prepared by Dr. Dolan-Henderson with testing done on July 21, 2015, and the second prepared by another neuropsychologist with testing on May 6, 2016. The player performed markedly better on the May 6, 2016 testing than he did on the 2015 testing administered by Dr. Dolan-Henderson. The Claims Administrator requested input from an Appeals Advisory Panel Consultant about whether there could be a reasonable explanation for the improvement reflected in the May 6, 2016 testing. The Appeal Advisory Panel Consultant noted that even accounting for "practice effects," that is, the expected improvement in scores after repeated exposure to neuropsychological testing, the extreme improvement demonstrated by the May 6, 2016 testing would discredit a finding of impairment for the player. The Appeals Advisory Panel Consultant also expressed concern that, given the conflicting reports submitted for the two other players, the testing from Dr. Dolan-Henderson may not contain results belonging to the player and felt it would be unacceptable to rely upon Dr. Dolan-Henderson's report.

Based on Dr. Dolan-Henderson's inconsistent explanations to the firm and to the Claims Administrator regarding the differing versions of reports for a player and the statements from the Appeals Advisory Panel Consultants after their review of Dr. Dolan-Henderson's testing that they could not accept any report prepared by Dr. Dolan-Henderson as reliable, the Claims Administrator concluded that there was a reasonable basis to support a finding that Dr. Dolan-Henderson misrepresented or concealed the results of his testing for the players he evaluated. The Claims Administrator issued Notices of Referral to Special Masters of Adverse Audit Report to the affected players on April 12, 2018.

No player affected by the Adverse Audit Report for Dr. Dolan-Henderson submitted an Opening Memorandum to address or challenge the Claims Administrator's findings. Neither Co-Lead Class Counsel nor Counsel for the NFL Parties submitted a Reply Memorandum addressing the Adverse Audit Report.

III. CONCLUSION AND REMEDIES.

Under Section 10.3(i) of the Settlement Agreement, the Special Masters' review and findings may include the following relief, without limitation: (a) denial of the claim in the event of fraud; (b) additional audits of claims from the same law firm or physician (if applicable), including those already paid; (c) referral of the attorney or physician (if applicable) to the appropriate disciplinary boards; (d) referral to federal authorities; (e) disqualification of the attorney, physician and/or Settlement Class Member from further participation in the Class

Action Settlement; and/or (f) if a law firm is found by the Claims Administrator to have submitted more than one fraudulent submission on behalf of Settlement Class Members, claim submissions by that law firm will no longer be accepted, and attorneys' fees paid to the firm by the Settlement Class Member will be forfeited and paid to the Settlement Trust for transfer by the Trustee into the Monetary Award Fund.

Upon review, the Special Masters find that claims relying on Dr. Dolan-Henderson's testing include a misrepresentation, omission, or concealment of material fact and that Dr. Dolan-Henderson's testing results do not meet the standard of care required for a Monetary Award under the Settlement Agreement. Specifically, Dr. Dolan-Henderson created two versions of a neuropsychological report purportedly for the same evaluation, but the versions contained conflicting information. He did this for two different players subject to the Claims Administrator's Adverse Audit Report. When questioned about the conflicting information for one player, Dr. Dolan-Henderson provided two different, irreconcilable explanations. Based on these facts, the Special Masters conclude that Dr. Dolan-Henderson misrepresented either the results of his neuropsychological testing or the reason(s) for his creation of two versions of testing results for the same player.

Accordingly, and pursuant to Section 10.3 of the Settlement Agreement, the Special Masters order these remedies:

1. **Disqualification of Dr. Dolan-Henderson:** Dr. Dolan-Henderson is disqualified from participation in the Program. Any Monetary Award Claim that relies on neuropsychological testing performed by Dr. Dolan-Henderson is disallowed and no claims may be submitted in reliance on his testing or opinions.

2. **Disposition of Monetary Award Claims Relying on Dr. Dolan-Henderson's Evaluations:** The Claims Administrator will deny without prejudice any Monetary Award Claim that relies on evaluation, testing or opinions performed or rendered by Dr. Dolan-Henderson. Those Settlement Class Members whose Monetary Award Claims rely on neuropsychological testing by Dr. Dolan-Henderson may seek a new evaluation through the Baseline Assessment Program, if they are eligible to participate in the BAP, or from a Qualified MAF Physician. If the original Qualifying Diagnosis reached by Dr. Dolan-Henderson or a physician relying on his testing is confirmed by the Qualified MAF Physician or the BAP Provider, the diagnosis date may be dated retroactively to match the date of the original Qualifying Diagnosis asserted in the Monetary Award Claim that relied on Dr. Dolan-Henderson's evaluation.

Wendell E. Pritchett, Special Master

Date: 8/29/18

Jo-Ann M. Verrier, Special Master

Date: 8/29/18

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
Kevin Turner and Shawn Wooden, *on behalf of themselves and others similarly situated,* Plaintiffs, v. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	**Hon. Anita B. Brody** Civ. Action No. 14-00029-AB
THIS DOCUMENT RELATES TO: ALL ACTIONS	

FINDINGS AND REMEDIES OF THE SPECIAL MASTER
PURSUANT TO SECTION 10.3(i) REGARDING 153 MONETARY AWARD CLAIMS

I. INTRODUCTION.

Under Section 10.3(i) of the Settlement Agreement, if upon completion of an audit the Claims Administrator determines that there has been a misrepresentation, omission, or concealment of a material fact made in connection with a claim for a Monetary Award, the Claims Administrator refers that claim to the Special Master for review and findings.

In the case at hand, the Claims Administrator investigated 153 Monetary Award Claims supported by neuropsychological testing performed by Dr. Serina Hoover. This investigation included reviews of relevant records, interviews with relevant individuals, and consultation with an Appeals Advisory Panel Consultant. The Claims Administrator concluded that Dr. Hoover misrepresented information submitted to the Program in connection with the 153 Monetary Award Claims. Accordingly, on November 9, 2017, the Claims Administrator referred these 153

Monetary Award Claims to the Special Master for review and findings pursuant to Section 10.3(i) of the Settlement Agreement.[1]

II. REVIEW OF FACTS.

As noted, these claims were referred to an Appeals Advisory Panel Consultant. The Consultant reported the following inadequacies in the neuropsychological evaluations performed by Dr. Hoover:

- Dr. Hoover excessively relied on patient complaints in the diagnosis of major neurocognitive disorder secondary to repetitive head injuries with behavioral disturbance;
- Dr. Hoover's assessments often violated standardized procedures (for example, administering Part B of the Trail Making Test without Part A);
- Certain testing interpretations were incorrect (e.g., better performance on the color-word trial of the Stroop test than expected based on individual color and word trials was erroneously used as an indicator of executive dysfunction);
- Dr. Hoover disregarded indicators of suboptimal effort, such as results showing that errors on the Tests of Memory Malingering exceeded the cutoff for suboptimal effort and scores in the invalid performance range on other validity tests. Dr. Hoover classified these as "valid" or "questionable" or otherwise provided unconvincing explanations; and
- Dr. Hoover labeled the MMPI-2 a "mood" inventory and incorrectly interpreted the testing.

The AAP Consultant concluded that the evaluations performed by Dr. Hoover fail to meet the standard of care required for approval of a Monetary Award.

Dr. Hoover reviewed the Appeals Advisory Panel Consultant's opinion and replied with her explanations and references to medical literature to support her conclusions. The Appeals Advisory Panel Consultant reviewed these responses and maintained the opinion that Dr. Hoover did not perform evaluations that meet the standard of care or that are free from bias.

The Claims Administrator noted other concerns with the evaluations. Multiple Players traveled from other states to California to be tested by Dr. Hoover, including twelve Players who reside in Florida and eleven who reside in Georgia.

Furthermore, the Claims Administrator noted concerns about the timing of Dr. Hoover's evaluations. Dr. Hoover allegedly evaluated and tested at least three Players on the same date on 25 different days, and on two days, one of which was New Year's Eve, she evaluated and tested eight Players in one day. These dates, where at least three or more Players were tested on one day, are listed below:

[1] The Claims Administrator also notified Settlement Class Members of the referral.

SCM Testing Date		Number of Claims from SCMs
1.	December 31, 2016	8
2.	December 21, 2016	8
3.	November 30, 2016	5
4.	December 10, 2016	5
5.	December 14, 2016	5
6.	August 21, 2016	4
7.	September 7, 2016	4
8.	September 14, 2016	4
9.	November 16, 2016	4
10.	December 3, 20176	4
11.	December 28, 2016	4
12.	December 29, 2016	4
13.	January 4, 2017	4
14.	June 8, 2016	3
15.	August 3, 2016	3
16.	August 10, 2016	3
17.	September 28, 2016	3
18.	October 5, 2016	3
19.	October 12, 2016	3
20.	November 9, 2016	3
21.	December 4, 2016	3
22.	December 6, 2016	3
23.	December 9, 2016	3
24.	December 19, 2016	3
25.	December 27, 2016	3
26.	**TOTAL**	**99**

On December 21, 2016 and December 31, 2016, Dr. Hoover allegedly examined eight Players and signed the corresponding reports on the day following the examinations (December 22, 2016 and January 1, 2017, respectively). Established procedures require that all portions of the examination protocol must be completed by the time Dr. Hoover signs the report. In these cases, the evaluation reports indicate that Dr. Hoover performed all testing and evaluation, and wrote the reports herself.

These reports show that the combined testing, interpretation, and report preparation time for the December 31, 2016 examinations is 134.5 hours across a 48 hour period.

In an interview with the Claims Administrator, Dr. Hoover indicated that she had three psychometrists assist with testing administration and interpretation. Even assuming Dr.

Hoover's use of three assistants, and equally dividing the work among the four individuals, each would have had to work approximately 17 hours straight on both December 31, 2016 and January 1, 2017. However, Dr. Hoover indicated that the work was not shared equally with the psychometrists but rather that Dr. Hoover herself had conducted initial interviews and some testing, and she herself prepared all reports.

Similarly, the combined testing, interpretation, and report preparation time stated in the reports for the eight December 21, 2016 examinations add up to 139.75 hours.

III. CONCLUSION AND REMEDIES.

Under Section 10.3(i) of the Settlement Agreement, the Special Master's review and findings may include the following relief, without limitation: (a) denial of the claim in the event of fraud; (b) additional audits of claims from the same law firm or physician (if applicable), including those already paid; (c) referral of the attorney or physician (if applicable) to the appropriate disciplinary boards; (d) referral to federal authorities; (e) disqualification of the attorney, physician and/or Settlement Class Member from further participation in the Class Action Settlement; and/or (f) if a law firm is found by the Claims Administrator to have submitted more than one fraudulent submission on behalf of Settlement Class Members, claim submissions by that law firm will no longer be accepted, and attorneys' fees paid to the firm by the Settlement Class Member will be forfeited and paid to the Settlement Trust for transfer by the Trustee into the Monetary Award Fund.

Upon review, the Special Masters find that claims relying on Dr. Hoover's testing include a misrepresentation, omission, or concealment of a material fact and that Dr. Hoover's testing results do not meet the standard of care required for a Monetary Award under the Settlement Agreement. Accordingly, and pursuant to Section 10.3 of the Settlement Agreement, the Special Masters order these remedies:

1. **Disqualification of Dr. Hoover:** Dr. Hoover is disqualified from participation in the Program. Any Monetary Award Claim that relies on neuropsychological testing performed by Dr. Hoover is disallowed and no claims may be submitted in reliance on her testing or opinions.

2. **Disposition of Monetary Award Claims Relying on Dr. Hoover's Evaluation:** The Claims Administrator will deny without prejudice any Monetary Award Claim that relies on evaluation, testing or opinions performed or rendered by Dr. Hoover. Those Settlement Class Members whose Monetary Award Claims rely on neuropsychological testing by Dr. Hoover may seek a new evaluation through the Baseline Assessment Program, if they are eligible to participate in the BAP, or from a Qualified MAF Physician. If the original Qualifying Diagnosis reached by Dr. Hoover or a physician relying on her testing is confirmed by the Qualified MAF Physician or the BAP Provider, the diagnosis date may be dated retroactively to match the date of the original Qualifying Diagnosis asserted in the Monetary Award Claim that relied on Dr. Hoover's evaluation.

3. **Other Remedies:** The Special Masters will continue to review the Monetary Award Claims supported by neuropsychological testing from Dr. Hoover and may order further remedies as deemed appropriate and necessary.

Wendell Pritchett, Special Master

Signed 30 of November, 2017.

Jo-Ann Verrier, Special Master

Signed 30 of November, 2017.

FINDINGS AND REMEDIES OF THE SPECIAL MASTERS PURSUANT TO SECTION 10.3(i) REGARDING 66 MONETARY AWARD CLAIMS

I. INTRODUCTION.

Pursuant to Section 10.3 of the Settlement Agreement and Rule 7(b) of the Rules Governing Audit of Claims (the "Audit Rules"), the Claims Administrator audited 62 Monetary Award claims supported by neuropsychological testing from seven neuropsychologists (referred to hereinafter as "these neuropsychologists") who used substantially the same template report used by Dr. Serina Hoover (for more information on Dr. Hoover, see Findings and Remedies of the Special Master Pursuant to Section 10.3(i) Regarding 153 Monetary Award Claims (Document 9507)). These neuropsychologists are: Drs. Daniel Zehler, Charles Furst, Therese Moriarty, Julia Johnson, Julie Keck-Olson, Nicole Anders and Phillip Pines. The Claims Administrator's investigation included reviews of relevant records, interviews with relevant individuals, and consultation with an Appeals Advisory Panel Consultant ("AAPC").

The Claims Administrator concluded that these neuropsychologists misrepresented information submitted to the Program in connection with the 62 Monetary Award claims. On 2/28/18, the Claims Administrator referred these 62 Monetary Award claims to the Special Masters for review and findings pursuant to Section 10.3(i) of the Settlement Agreement and notified the affected Settlement Class Members. Since making the referral, the Claims Administrator identified an additional four claims that rely on evaluations from one of these neuropsychologists and these four will be subject to the same treatment as the 62 claims addressed in the Audit Report. The Special Masters reviewed the Record of the Audit Proceeding and issue these findings and remedies.

II. REVIEW OF FACTS.

The Claims Administrator began auditing claims supported by neuropsychological testing from these neuropsychologists after finding that the neuropsychological reports that they used were remarkably similar in their form and in their actual wording to the report template that Dr. Serina Hoover used. The Claims Administrator sought to determine whether the testing results from these neuropsychologists presented misrepresentations, omissions, or concealment of material fact.

The Claims Administrator asked an AAPC to review seven sample reports from these neuropsychologists. The AAPC concluded that these neuropsychologists' reports were problematic as follows:

1. Their assessments often violated standardized procedures.
2. They ignored test results indicating invalid performances.
3. They accepted player self-reports of impairment at face value, despite indications that players exaggerated or demonstrated unbelievable symptoms in light of the standardized, validated tests.

4. Even if the players' test scores were valid, the doctors did not always reach diagnostic conclusions suggested under the Settlement Agreement framework.
5. They grossly inflated the time they spent on assessments.

The Claims Administrator attempted to interview these neuropsychologists and report the following:

Drs. Furst and Moriarty stated that they got the report template from Peter Shahriari of the Law Office of Hakimi & Shahriari (f/k/a Top NFL Lawyers). Dr. Gabichvadze, the director of the Psych Testing Center where Drs. Olsen-Keck, Pines, and Anders performed neuropsychological evaluations of players, stated that the doctors at the Center also received the template from Mr. Shahriari. Dr. Johnson was too busy for an interview and asked the Claims Administrator to direct any questions to Mr. Shahriari. Dr. Zehler informed the Claims Administrator that his employer was an acquaintance of Dr. Hoover and that she instructed him on how to perform his evaluations; Dr. Zehler used Dr. Hoover's psychometrists.

Regarding evaluation timing, Drs. Zehler and Keck-Olson performed multiple test sessions on the same day, which the AAPC stated devalues the reliability of the submitted reports. Even if some of Dr. Zehler's recorded hours should instead be attributed to the psychometrists Dr. Hoover recommended, the multiple evaluations on the same day suggest that the time billed for the testing was inflated. Table 1 lists the dates and times Dr. Zehler spent testing and evaluating the players, excluding report preparation time, which Dr. Zehler says occurred on another day:

Table 1	**Multiple Players Dr. Zehler Evaluated on the Same Day**	
Testing Date	**Players Examined**	**Total Hours Spent**
5/27/17	4	52.25
5/31/17	3	39
6/7/17	3	39.25
5/2/17	2	20
6/10/17	2	27.25
8/9/17	2	27.25
8/16/17	2	25

Dr. Keck-Olson evaluated and tested two players apiece on 11/21/16 and 12/1/16 for 15 hours each. Dr. Keck-Olson's reports state that testing, scoring and interpreting testing, and report preparation all occurred on the same date. She said she did all the testing herself. For all 16 of her reports, Dr. Keck-Olson indicated that testing took seven hours, scoring and interpretation took three hours and report preparation took five hours. Performing 30 hours of work in one day is impossible and suggests inflated billing. These dates and times spent are listed in Table 2:

Table 2	Multiple Players Dr. Keck-Olson Evaluated on the Same Day	
Player Testing Date	**Players Examined**	**Total Hours Spent**
11/21/16	2	30
12/21/16	2	30

The Claims Administrator also noted potential discrepancies between players' Level 2 Neurocognitive Impairment determinations by these neuropsychologists, and the activities and/or employment reported by the players. According to an Appeals Advisory Panel ("AAP") member, a player's continued ability to function independently outside the home should be considered a "red-flag" that a diagnosis of Level 2 Neurocognitive Impairment may not be consistent with the clinical abilities. Twelve claims were analyzed in which the player received a Level 2 Neurocognitive Impairment Qualifying Diagnosis but told the neuropsychologist that he was working or studying. In seven of these instances, the players engaged in significant employment or other activities.

III. CONCLUSION AND REMEDIES.

Under Section 10.3(i) of the Settlement Agreement, the Special Masters' review and findings may include the following relief, without limitation: (a) denial of the claim in the event of fraud; (b) additional audits of claims from the same law firm or physician (if applicable), including those already paid; (c) referral of the attorney or physician (if applicable) to the appropriate disciplinary boards; (d) referral to federal authorities; (e) disqualification of the attorney, physician and/or Settlement Class Member from further participation in the Class Action Settlement; and/or (f) if a law firm is found by the Claims Administrator to have submitted more than one fraudulent submission on behalf of Settlement Class Members, claim submissions by that law firm will no longer be accepted, and attorneys' fees paid to the firm by the Settlement Class Member will be forfeited and paid to the Settlement Trust for transfer by the Trustee into the Monetary Award Fund.

Upon review, the Special Masters find that claims relying on these neuropsychologists' testing may involve a misrepresentation, omission, or concealment of a material fact. Accordingly, and pursuant to Section 10.3 of the Settlement Agreement and Audit Rule 31(i), the Special Masters order these remedies for the 66 claims based on testing by these neuropsychologists (and any future claim resting on neuropsychological testing by one of these neuropsychologists):

1. **Individualized Assessment by the AAP:** The Monetary Award claims that rely on neuropsychological testing by any one of these neuropsychologists shall be directed to a single member of the AAP, with consultation from a single AAPC, for individualized assessment.

2. **Final Determination:** After this AAP review, the Claims Administrator will issue an Award or Denial Notice on each claim, which will be subject to appeal under Section 9.5 of the Settlement Agreement.

It is noted that some of these 66 Monetary Award claims are subject to another Audit investigation or an Audit Proceeding before us. These claims will not proceed under the remedy above unless and until the other Audit issues are resolved without denial of the claim.

Several players who were seen by one of these neuropsychologists have withdrawn their claims. Under Audit Rule 13, a Retired NFL Football Player with a claim in Audit may at any time withdraw that claim. As is always the case, that player may be examined by a Qualified BAP Provider (if eligible for the BAP) or by a Qualified MAF Physician and, if found to have a Qualifying Diagnosis, substitute a new Diagnosing Physician Certification, including a medically indicated date of diagnosis (that may precede the date of the new exam), to the Claims Administrator for review in the claims process.

Wendell Pritchett, Special Master

9/11/18
Date

Jo-Ann Verrier, Special Master

9/11/18
Date

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	:	No. 2:12-md-02323-AB MDL No. 2323
	:	**Hon. Anita B. Brody**
THIS DOCUMENT RELATES TO: OBJECTION OF [redacted] REGARDING DENIAL OF MONETARY AWARD	:	

INTRODUCTION

This matter requires the Special Master to determine whether, upon conclusion of an audit and the issuance of a new Monetary Award determination, a party has an additional 30 days to appeal under the Settlement Agreement. Here, the Special Master must also decide whether there is clear and convincing evidence that the grant of a Monetary Award to the claimant was incorrect.

For the reasons stated below, the Special Master grants the appeal of the NFL Parties.

FACTUAL AND PROCEDURAL HISTORY

[redacted] ("Claimant") is a Retired NFL Player and Class Member under the Amended Class Action Settlement Agreement ("the Settlement Agreement"). He received a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment by a Board Certified Neurologist, Dr. [redacted] on June 3, 2015, prior to the Effective Date of the Settlement Agreement. (Doc. 153235, Ex. 1, at 40.)[1]

Pursuant to §6.4 of the Settlement Agreement, Claimant's Qualifying Diagnosis was reviewed by the Appeals Advisory Panel ("AAP"). (*Id.*, at 1.) The Appeals Advisory Panel approved the Qualifying Diagnosis in spite of an AAP Consultant's recommendation to deny the claim. (*Id.*, at 2; Doc. 111820, at 2.) According to Claimant's brief, he received a Notice of Monetary Award on July 20, 2017; 32 days later, Claimant's award was the subject of a random

[1] The Effective Date of the Settlement Agreement is defined in §2.1(jj) as the day following the deadline for appeals of the Court's approval of the Settlement Agreement, which was January 7, 2017. *See NFL Concussion Settlement Website*, "Basic Information", FAQ #11.

audit by the Claims Administrator, pursuant to §10.3(c) of the Settlement Agreement. (Doc. 116229.)

Claimant's award was formally approved following completion of the audit, and he received a new Notice of Monetary Award on December 4, 2017. (Doc. 145915.) On January 3, 2018, thirty days from Claimant's receipt of this Notice, the NFL Parties appealed. (Doc. 150806.) The Special Master requested that Claimant's case be reviewed by the AAP; at this point, the AAP determined that [redacted] claim should be denied. (Doc. 172127, at 1-2.) On May 31, 2018, the Special Master granted the NFL Parties' appeal and denied the claim. (Doc. 173671.)

On June 21, 2018, Claimant filed an Objection to the Special Master's ruling. (Doc 179984.) The court remanded the matter to the Special Master for further explanation of the determination. (Doc. 180031.)

STANDARD OF REVIEW

The Special Masters must decide an appeal of a Monetary Award based on a showing by the appellant of clear and convincing evidence that the determination of the Claims Administrator was incorrect. (Order Appointing Special Masters, 5.) "Clear and convincing evidence" is a recognized intermediate standard of proof—more demanding than preponderance of the evidence, but less demanding than proof beyond a reasonable doubt. In re Fosamax Alendronate Sodium Prods. Liab. Litig., 852 F.3d 268, 285-86 (3d Cir. 2017) ("Black's Law Dictionary defines clear and convincing evidence as 'evidence indicating that the thing to be proved is highly probable or reasonably certain.'").

DISCUSSION

A. Whether the NFL Parties Timely Appealed

Claimant argues that the NFL Parties waived their right to an appeal by failing to submit their Appeals Form within thirty days of the initial Notice of Monetary Award Claim Determination, as required by §9.7(a) of the Settlement Agreement. (Doc. 153235, at 2.) As this is a threshold issue that would preclude the Special Master's review of the Claim Determination, this issue must be determined before evaluating the merits of the appeal.

Section 9.7 of the Settlement Agreement requires the submission of an Appeals Form "no later than thirty (30) days after receipt of ***a*** Notice of Monetary Award Determination" (emphasis added). There is no requirement in the Settlement Agreement that the Appeals Form must be submitted within thirty days of ***the first*** Notice of Monetary Award Determination. Nor is there any restriction on appeals following a Notice of Monetary Award Determination resulting from the completion of an audit.

Claimant states that he received an initial Notice of Monetary Award Determination on July 20, 2017. (Doc. 153235, at 1.) His claim was then selected as part of the monthly 10% audit of eligible claims as dictated by §10.3 of the Settlement Agreement. Following conclusion of the

audit, Claimant received another Notice of Monetary Award Determination on December 4, 2017. By the express terms of the Settlement Agreement, nothing precludes an appeal from either party within thirty days of such a Notice.

Claimant's Notice of Monetary Award Determination from December 4 explicitly includes a "Deadline to Appeal" of January 3, 2018. (Doc. 145915, at 1.) The NFL Parties filed their Appeals Form on January 3; accordingly, the NFL Parties' appeal was timely by the terms of §9.7 of the Settlement Agreement. (Doc. 150806.)

B. Whether There is Clear and Convincing Evidence That Claimant Should Have Been Denied a Monetary Award

Based on the advice of the Appeals Advisory Panel, the Special Master concluded that there is clear and convincing evidence that Claimant's diagnosis was not generally consistent with the Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment as defined in the Settlement Agreement. For living Retired NFL Football Players diagnosed prior to the Effective Date, a diagnosis of Level 1.5 Neurocognitive Impairment must be accompanied by "evaluation and evidence generally consistent with the diagnostic criteria set forth in" the relevant section of Exhibit A-1 of the Settlement Agreement. (Settlement Agreement Ex. A-1, hereinafter "Injury Definitions.") Claimant's records do not provide evidence generally consistent with the diagnostic criteria set forth in the Settlement Agreement for Level 1.5 Neurocognitive Impairment.

A Retired NFL Player seeking a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment must exhibit (1) concern that there has been a severe decline in cognitive function, (2) evidence of a moderate to severe cognitive decline from a previous level of performance, and (3) functional impairment. (*Id.*) Claimant has fulfilled the first requirement by virtue of his own report. However, based on the advice of the AAP, the Special Master concludes that there is clear and convincing evidence that Claimant's records are not generally consistent with requirements (2) and (3).

As noted by the AAP Consultant, Claimant's cognitive assessment does not establish moderate to severe cognitive decline. Claimant's records do not include evidence supporting a 1.0 (Mild) score in the Home & Hobbies category, which requires "definite impairment of function at home; more difficult chores abandoned; [and/or] more complicated hobbies and interests abandoned."

CONCLUSION

For the foregoing reasons, Special Master grants the appeal of the NFL Parties and denies the grant of a Monetary Award.

Date: September 24, 2018

Wendell E. Pritchett, Special Master

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	:	No. 2:12-md-02323-AB MDL No. 2323
	:	**Hon. Anita B. Brody**
THIS DOCUMENT RELATES TO: NFL PARTIES' REQUEST FOR COMPULSORY AAP/AAPC REVIEW OF MONETARY AWARD CLAIMS	:	

INTRODUCTION

This matter requires the Special Master to determine whether an Appeals Advisory Panel member ("AAP") or Appeals Advisory Panel Consultant ("AAPC") must review all claims that turn on the sufficiency of the medical evidence behind the claimant's Qualifying Diagnosis. For the reasons stated below, the Special Master holds that compulsory AAP/AAPC review is not required by the Settlement Agreement.

DISCUSSION

The NFL Parties have requested a stay of payment and re-review of all appeals that have not already been reviewed by the AAP/AAPC and "turn on technical, medical grounds," including diagnoses made by Qualified MAF Physicians (Letter from NFL Parties to the Special Master dated June 28, 2018 ("NFL Letter"), at 1-2.) While acknowledging that Qualified MAF Physicians are approved by the parties, the NFL Parties state that it was "always the intent of the Parties that AAPs and AAPCs would be used on appeals involving [diagnoses made by] Qualified MAF Physicians." (NFL Letter, at 2.)

The plain language of the Settlement Agreement does not evince such an intent. Section 9.8 of the Settlement Agreement states that, with respect to appeals taken by the parties, the court "may be assisted, ***in its discretion***, by any member of the Appeals Advisory Panel and/or an Appeals Advisory Panel Consultant" (emphasis added). The Settlement Agreement thus makes clear that the Court – and by extension, the Special Master – has the sole discretion to decide whether to consult an AAP/AAPC before ruling on an appeal.

Certain categories of compulsory AAP/AAPC review are explicitly included in §6.4(a) of the Settlement Agreement. These include Qualifying Diagnoses made prior to the Effective Date by neurologists, neurosurgeons, and physicians who are ***not*** Qualified MAF Physicians. The fact that Qualifying Diagnoses made by Qualified MAF Physicians are not included in this list further clarifies that the parties did not intend for compulsory AAP/AAPC review of such diagnoses.

Requiring AAP/AAPC review of all claims turning on medical grounds would unduly limit the discretion given to the Court and the Special Master under the plain language of the Settlement Agreement. Such compulsory review would also burden Settlement Class Members with an additional requirement for approval of claims beyond the requirements set forth in the Agreement. For these reasons, the Special Master denies the NFL Parties' request to compel AAP/AAPC review of all claims that turn on the sufficiency of the medical evidence supporting the Qualifying Diagnosis.

CONCLUSION

The NFL Parties' request for a stay of payment of claims pending AAP/AAPC review is denied.

Date: September 28, 2018

Wendell E. Pritchett, Special Master